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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BRYANT CHUCKING GRINDER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petitioner, Bryant Chucking Grinder Company, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit denying a petition for review and enforcing the order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra* pp. 30-59) is not yet reported officially. The

Board's Decision and Order (J.A. 758-767),[1] including the Trial Examiner's Decision (J.A. 649-755), are reported at 160 NLRB No. 125.

JURISDICTION

The opinion of the Court of Appeals was entered on December 12, 1967, a decree (Appendix B, *infra* pp. 60-61) was entered on January 3, 1968, and timely petitions for rehearing and rehearing *en banc* (Appendix C, *infra* pp. 62-63) were denied on January 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly held that cards authorizing a union to represent employees for bargaining purposes are valid designations, where the signatory employees were not told that the sole purpose of the cards was to obtain a Board representation election, but they either were told or heard that the purpose of the cards was to obtain an election, or they believed that the cards would serve only that function.

2. Whether the court below properly held that an employer does not have a good faith doubt concerning a union's majority status where the holding rests solely on the employer's position that it would not recognize the union without a National Labor Relations Board certification after an election.

3. Whether an unconditional Board bargaining order is an appropriate remedy in a refusal to bargain

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

case, where the General Counsel held a charge in abeyance for 15 months pending a change in the law sanctioning the issuance of a complaint against the employer, the Board order was issued four years after the unfair labor practice charge was filed, and the union's majority status is questionable.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*, are set forth in Appendix D, *infra* pp. 64-66.

STATEMENT OF THE CASE

In this case, a divided Court of Appeals sustained a decision of the National Labor Relations Board in which the Board found, *inter alia*, that Bryant, in violation of Section 8(a)(5) of the Act, had refused to bargain with United Electrical, Radio and Machine Workers of America (UE) Local 218, hereinafter called "the Union."

A. The Facts

1. *The Union's Request for Recognition and Its Election Petition; Bryant's Decision to Reject the Union's Request*

In May 1962, the Union began an organizing drive among Bryant's employees (J.A. 300). On August 14, 1962, the Union, by letter, demanded recognition from Bryant as the bargaining representative of a majority of Bryant's employees (J.A. 69, 245-246, 744). On the same day the Union arranged to file, and two days later filed, an election petition with the Board's First Regional Office; and this occurred be-

fore the Union had received Bryant's response to the August 14 demand (J.A. 313-314). A Union handbill announcing it had petitioned for an election was immediately distributed to Bryant's employees (J.A. 92-93). Neither at the time of making its recognition demand nor thereafter did the Union make any attempt to substantiate to Bryant its claim that a majority of Bryant's employees had authorized it to represent them (J.A. 313-314, 425).

The Union's written request for recognition was received on August 14, 1962, by Nicolaas Leyds, Bryant's Vice President and General Manager (J.A. 419). Leyds knew, and considered, the fact that in 1956 and 1959 unions had also claimed majority status; and that, when the claims were put to election tests (the Union was on the ballot in 1959) a majority of Bryant's employees had in each instance voted against union representation (J.A. 420-421, 437-438, 665-666).

Leyds, before replying to the Union, conferred several times with Bryant's personnel and works managers and with the Industrial Relations Department of the parent Ex-Cell-O Corporation (J.A. 420). He was informed of election experiences at three Ex-Cell-O plants where unions had also claimed majority status, but then had lost ensuing elections (J.A. 421, 437-438).

Before a final decision on the Union's demand was reached, the Board's Regional Office notified Leyds that the Union had filed a petition for election (J.A. 419-420). Neither the Union's petition nor its earlier letter requesting recognition made clear to Leyds what the Union considered to be the appropriate bargaining unit. In particular, it was not clear whether

the Union was seeking to represent Bryant's Computer Division employees who had been included among those eligible to vote in the 1956 and 1959 elections (J.A. 424, 442).

Because of the foregoing circumstances, and other supporting considerations (J.A. 420-424), Leyds decided to refuse the Union's request for recognition. This decision, expressed in conclusionary terms as a Company policy, was conveyed to the Union by letter dated August 17, 1962 (J.A. 70, 420).

2. *The 1962 Representation Election; the General Counsel's Action on the Charge Against Bryant*

On November 1, 1962, the Board conducted a secret ballot election among Bryant's employees (J.A. 32-35, 651). The employees rejected the Union's claim of majority status by casting 184 votes against the Union as opposed to 124 votes for the Union; nine ballots were challenged (J.A. 137).

On December 18, 1962, the Board's Regional Director upheld Union objections to the election, because of Bryant's announcement during the campaign of certain pension benefits (made as part of the grant of a lawful and unobjectionable wage increase) and because of a question asked by one foreman during the course of routine merit interviews with employees in his department. The Director therefore ordered the election set aside and a new election held at a time and place to be determined (J.A. 651). Bryant took no appeal from this order, indicating instead its willingness to proceed to a new election at once. A new election was blocked by the Union, however, when, on January 3, 1963, it filed an unfair labor practice charge against Bryant, alleging violations of Sections

8(a)(1) and (5) of the Act (J.A. 651-652). On February 8, 1963, the Regional Director approved a settlement agreement with Bryant covering the foreman's questioning and the announcement of pension benefits, purported violations of Section 8(a)(1) of the Act, and dismissed the Section 8(a)(5) allegations (J.A. 652). The dismissal followed the rule of *Aiello Dairy Farms*, 110 NLRB 1365, that a labor organization, having elected to proceed to a representation election in the face of employer misconduct of which it had knowledge, may not thereafter seek bargaining status through charging an employer with an unlawful refusal to bargain.

On March 13, 1963, the Union filed with the General Counsel a request for review of the Regional Director's refusal to issue a Section 8(a)(5) complaint (J.A. 43-61, 652). The General Counsel withheld action upon this request for some 14 months. The action was withheld because some three months after the review request was filed the General Counsel came to the belief that the Board was prepared to reexamine the *Aiello* rule; and, to this end, the General Counsel held the review request in abeyance, but issued complaints in other selected cases that presented the matter for Board consideration (J.A. 129-132). On May 22, 1964, immediately following the Board's decision in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, which reversed the *Aiello* rule, the General Counsel sustained the Union's appeal, and directed the Regional Director to set aside the Section 8(a)(1) settlement agreement and to issue a complaint charging Bryant with violations of both Sections 8(a)(1) and (5) of the Act (J.A. 30-31).

3. *The Union's Claimed Majority Status*

a. *The Union's drive to get Bryant's employees to sign authorization cards*

The Union's organizing campaign included mass distribution of union authorization cards, individual solicitation of employees, preparation and distribution of handbills, and the holding of meetings. The campaign was run by the Union's International representative, Hugh Harley (J.A. 243-244, 245, 299-300, 303, 307-308, 311, 318-320).

At the start of the campaign, Harley indicated that the Union was contemplating an election as the means of obtaining recognition (J.A. 727). Thus Harley stated at a Union meeting that "the Union would like to have enough cards signed up to be sure if it comes to an election they will win the election" (J.A. 497-498, 727-728). Harley also told one employee, "We were not taking any chances this time; we were going to have signatures enough before we asked for an election" (J.A. 467-468, 728). And a Union handbill distributed on August 3, 1962 (J.A. 88-89) explained the purpose of the authorization cards as follows:

> The UE card has two purposes:
>
> 1. We will present the cards to the National Labor Relations Board to get an election. The NLRB keeps your card confidential. They never show your card to the company.
>
> 2. Your card is your written pledge that you want UE Local 218 at Bryant. If we have your card we will count on your vote. If we don't have your card, experience tells us we cannot count on your vote.

The same handbill also stated:

COMPANY DOES NOT SEE YOUR UE CARD

Several Bryant workers have told us they are in favor of UE Local 218, and that they will vote for the Union in an NLRB election. *But they have not yet signed UE cards because they are afraid the Company will see their cards and discriminate against them.*

The fact is that Bryant Management will never see your UE card and the Union will never show your card to the Company. [Emphasis in original.]

b. *Employee testimony concerning the circumstances surrounding the signing of cards*

There were 337 employees in the bargaining unit (J.A. 664). A majority of the 198 employees who signed union authorization cards testified or were prepared to testify that they were told or heard that the purpose of the cards was to obtain an election or that it was their understanding the cards were to be used for this purpose (J.A. 730-744). Thus, 57 employees testified that they signed cards because of either direct representations to them or general talk in the plant that this was the purpose of the cards.[2]

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[2] Fifteen employees testified that before they signed cards they were told that the purpose of signing the cards was to get an election: Broderick (J.A. 393-402); Holden (J.A. 548-550); Williams (J.A. 566-568, 570); Godin (J.A. 461-462); Yessman (J.A. 476-478); Lynch (J.A. 354, 358-359, 362-365); Bohen (J.A. 518-526); Delehanty (J.A. 458-460); Stevens (J.A. 550-552, 554); O'Hara (J.A. 467-470); Roys (J.A. 577-581); White (J.A. 526-531); Hoyt (J.A. 555-566); E. Burbank (J.A. 531-537); J. LeMere (J.A. 465-467). Bohen and LeMere were told at a Union meeting.

Twelve others named specific union organizers as having said the same thing just before they signed: Davidson (by

And Bryant offered, but was not permitted, to prove that at least 117 employees signed their cards to obtain an election or signed with the understanding that an election would be held if a majority of the employees signed cards (J.A. 726-727).[3]

Thirty-seven employees, substantially more than needed to show the Union's lack of majority status, signed their cards on or after August 3, 1962, the date on which the Union's handbill quoted from above was distributed to employees.[4]

Hussey) (J.A. 365-367, 369); Lohutko (by Gavin and Kane) (J.A. 507-509); Rubacka (by Burbank) (J.A. 478-481); Gray (by Gavin) (J.A. 340-341); Westcott (by Willoughby) (J.A. 403-405); Murchie (by Gavin) (J.A. 454-457); Matulonis (by Miles) (J.A. 572-577); Hall (by Hendee and Putnam) (J.A. 331); Morris (by Hendee) (J.A. 327-331); Davis (by Lafayette) (J.A. 537-538); Sherer (by Lafayette) (J.A. 413); and Perry (by Goodell, Sr.) (J.A. 385-391).

Eight of the foregoing 27 employees signed cards at or after the time the August 3rd handbill was distributed by the Union: Matulonis (J.A. 572-577); Hoyt (J.A. 555-566); Hall (J.A. 331-340); Morris (J.A. 327-331); Davis (J.A. 537-547); Sherer (J.A. 412-418); E. Burbank (J.A. 531-537); and Perry (J.A. 384-391).

Thirty other employees testified that before they signed cards they had heard talk in the plant either that there would be an election or that the purpose of signing cards was to get an election. See, for example, J.A. 221-223, 470-475, 482-483, 498-506, 509-510.

[3] Bryant's offer of proof was made in question and answer form on cross-examination of 87 employees and in written form with respect to 30 employees.

[4] August 3, 1962: Honney, G.C. Ex. 94
Severns, G.C. Ex. 128
Wright, G.C. Ex. 134
August 4, 1962: Anoe, G.C. Ex. 166

[Footnote continued on Page 10]

4. The Trial Examiner's Actions Following Issuance of the Complant

The complaint against Bryant issued on June 10, 1964 (J.A. 1-8). The hearing thereon began on July

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[4] [Continued]

August 6, 1962:	Green, G.C. Ex. 16
	Matulonis, G.C. Ex. 55 (J.A. 55)
	Brodeur, G.C. Ex. 64
	Ripchik, G.C. Ex. 174
	Poljacik, G.C. Ex. 310
	Josselyn, G.C. Ex. 313
August 7, 1962:	Clarey, G.C. Ex. 14
	Russell, G.C. Ex. 26
	Harrison, G.C. Ex. 51
	Rowe, G.C. Ex. 162
	Brown, G.C. Ex. 184
	Page, G.C. Ex. 186
August 8, 1962:	King, G.C. Ex. 19
	Carnes, G.C. Ex. 28
	Hoyt, G.C. Ex. 90 (J.A. 41)
	Hall, G.C. Ex. 142 (J.A. 62)
	Morris, Jr., G.C. Ex. 161 (J.A. 65)
	Bedell, G.C. Ex. 165
	Hendee, G.C. Ex. 178
August 9, 1962:	Patria, G.C. Ex. 47
	Davis, G.C. Ex. 69 (J.A. 40)
	Gobin, G.C. Ex. 82
	Waysville, G.C. Ex. 86
	Sherer, G.C. Ex. 153 (J.A. 64)
	Matuszerwski, G.C. Ex. 154
	Converse, G.C. Ex. 158
	Morse, G.C. Ex. 163
August 11, 1962:	Dubanevich, G.C. Ex. 75
	Burbank, G.C. Ex. 193 (J.A. 68)
August 13, 1962:	Perry, G.C. Ex. 103 (J.A. 42)
	Morse, G.C. Ex. 314
August 16, 1962:	Cleveland, G.C. Ex. 168

(All the foregoing exhibits, whether or not included in the Joint Appendix in the court below, are included in the record certified by the Board to that court.)

28, 1964. On July 29, Bryant filed an interim appeal to the Board from a ruling by the Trial Examiner refusing to allow Bryant to cross-examine witnesses concerning the circumstances surrounding the signing of union authorization cards relied upon by the General Counsel as proof that the Union was a majority representative. On August 4, 1964, the Board granted Bryant's appeal and reversed the Examiner's ruling (J.A. 19-22, 758). Because the Examiner had refused to recess the hearing pending Board action on Bryant's appeal, most of the nearly 200 witnesses called by the General Counsel had completed their direct examination by the time the Board ruled. Bryant was thus compelled to recall many of these witnesses for cross-examination. On August 11, shortly after the recall procedure had begun, the Examiner adjourned the hearing indefinitely to consider "the proper procedure and proper manner" to be followed by Bryant in its cross-examination (J.A. 19-22; 384). On September 8, the Examiner issued a new "ruling" on the matter (J.A. 27-29).

The hearing was resumed on September 28, 1964, and continued through October 9, 1964. On June 4, 1965, the Examiner's Decision issued (J.A. 649-751).

B. The Board's Decision and Order

On October 4, 1966, almost four years after the election in which Bryant employees had rejected the Union and some 45 months after the charges had been filed, a three-member panel of the Board ruled on the complaint against Bryant (J.A. 758-767). Adopting the Trial Examiner's findings, conclusions, and recommendations, the Board found: (1) That the Section 8(a)(5) allegations of the complaint should not be dismissed despite the General Counsel's delay,

pending the Board's announcement of the overruling of the *Aiello* doctrine, in issuing the complaint (J.A. 759-761); (2) That Bryant violated Section 8(a)(1) of the Act by unlawfully interrogating and threatening its employees with reprisals, and by announcing and granting improvements in pension benefits (J.A. 675-678, 694-698, 761-762);[5] and (3) That Bryant's

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[5] The Board found that before the Board-conducted election was held 41 employees were unlawfully interrogated by seven Bryant supervisors. The bulk of the interrogation consisted of a single question by one foreman, Barber, who, concluding that he had not been doing a good job if members of his department wanted a union, in August and early September 1962 asked such employees what they could get from the Union that the company could not give. The question was asked during routine merit rating interviews and was done without company knowledge (J.A. 666-668). Three employees testified that foreman Lemire asked a similar question (J.A. 673); another that foreman Belaire asked how he thought the election was coming out (J.A. 673); another that Belaire asked what he thought about the Union and whether it was going to get in (J.A. 673); and another that foreman Caron asked how he felt about the Union (J.A. 674). One employee, Stephens, testified that machining superintendent Lester, in the course of a conversation about unionization in general, asked if Stephens thought he could benefit in some way by the Union that he couldn't settle with the company (J.A. 668-672). In addition, foremen Caron and Rice asked three employees on separate occasions whether they had signed union cards (J.A. 672, 674).

The reprisal threats found unlawful by the Board consisted of a statement by foreman Belaire to employee Bashaw in mid-October 1962 that if the Union came in job transfers would be negotiated and present practices would be changed (J.A. 677); and an inquiry by Superintendent Lester on the same day as to whether Bashaw liked his job (J.A. 677-678).

The Board found unlawful Bryant's action on October 9 and 10, 1962, in announcing as part of an overall wage package improvements in its employee pension plan, in announcing

refusal to bargain with the Union violated Section 8 (a) (5) of the Act because, as shown by their authorization cards, 196 of the employees in a unit of 337 had validly designated the Union as their bargaining agent at the time the Union had made its demand for recognition, and because Bryant's subsequent unfair labor practices demonstrated a rejection of the collective bargaining principle and gave rise to the inference that its initial refusal to bargain was not in good faith (J.A. 726-747, 762-763).[6] In deciding on the basis of authorization cards that the Union was the majority representative, the Board followed the rule set forth in *Cumberland Shoe Corp.*, 144 NLRB 1268, 1269, *enforced*, 351 F.2d 917 (C.A. 6) (a card may be invalidated only if the solicitor misrepresented to the signer that the card's *only* purpose was to get an election), and rejected Bryant's argument that most of the employees had signed cards in order to have the Union's status determined in a Board-conducted election (J.A. 726, 734). The Board ordered Bryant to bargain with the Union upon request, and to cease and desist from violating Section 8(a) (1) of the Act (J.A. 763-764).

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further improvements in pension benefits on October 29, 1962, and in placing the increased pension benefits in effect on January 1, 1963 (J.A. 694-698, 762).

Bryant is raising no issue in this Court with respect to the validity of the foregoing Board findings.

[6] The Board also found that Bryant violated Section 8(a) (1) of the Act by dissuading employees from cooperating with the Board's 1964 investigation of the unfair labor practice charges against Bryant, and by reinterviewing witnesses who had testified at the 1964 unfair labor practice hearing (J.A. 721, 723-725). This finding, which was affirmed by the Court of Appeals, is not questioned in this Court.

One Board member, Member Jenkins, dissented in part. He would have found the General Counsel's delay in acting on the charge against Bryant to have been unfair and unduly burdensome, would therefore have applied the *Aiello* rule to the charge, and accordingly would have found no Section 8(a)(5) violation (J.A. 765-767).

C. The Decision of the Court of Appeals

The Court of Appeals (with Judge Friendly concurring, and Judge Anderson dissenting) enforced the Board's order. With respect to the Board's conclusion that Bryant had unlawfully refused to bargain with the Union, Judge Hays said that the Union's authorization cards were valid indicia of the Union's majority because the union organizers had not told the employees that the "sole" purpose of signing cards was to secure an election, and therefore there had been no misrepresentation as to the cards' purpose. Judge Hays also said that Bryant's lack of good faith doubt had been shown by its failure to suggest a card check, by its announcement of its policy of refusing recognition to unions without an election, and by its Section 8(a)(1) violations (Appendix A, *infra* pp. 34-35). Citing *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, n. 16, Judge Hays said further that the General Counsel's "mere delay" in issuing the complaint was not sufficient reason for denying enforcement to the Board's order (Appendix A, *infra* p. 36).

Expressing "serious qualms" because of the "inordinate delay . . . almost wholly attributable to the Board" of over five years since the Union's organizing campaign, Judge Friendly "reluctantly" concurred in enforcing the Board's "exceedingly ill-ad-

vised" bargaining order. Particularly because of the delay, but also because of the Union's "small and doubtful majority," the considerable employee turnover, and the fact that "nothing now stands in the way of a fair election," Judge Friendly stated that there was "much force" for the position that a bargaining order was not an appropriate remedy. However, his grant of enforcement—"distasteful though that is"—was compelled, Judge Friendly said, by the controlling authority of *N.L.R.B.* v. *Katz*, *supra*, and *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (Appendix A, *infra* pp. 36-37, 44-45).

Judge Friendly said that authorization cards are invalid if ". . . signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." Under this test, Judge Friendly said a "considerable number" of the Union's cards were invalid for proven misrepresentations by solicitors; but Judge Friendly did not believe that the misrepresentations tainted the other cards or required the General Counsel to show that they were not tainted (Appendix A, *infra* pp. 37-38, 41-44). Judge Friendly agreed with Judge Hays that Bryant's good faith doubt had been disproved, but only because of Bryant's position that it would not recognize a union without a Board certification (Appendix A, *infra* p. 37, n.1).

Judge Anderson, in dissent, would have denied enforcement to the Board's bargaining order, and would instead have ordered the holding of a new election. He said that a bargaining order, imposed nearly five years after the Union had been rejected in a secret ballot election, after numerous delays attributable to

the Trial Examiner, the Board, and the General Counsel (". . . the General Counsel awaited a change in the law so that he might prosecute the case against respondent . . ."), and after Bryant's work force had undergone natural change,[7] deprived Bryant employees of the right guaranteed by Section 7 of the Act to decline any form of organized representation (Appendix A, *infra* pp. 50-51). *Franks Bros. Co.* v. *N.L.R.B.*, *supra*, and *N.L.R.B.* v. *Katz*, *supra*, are not controlling, Judge Anderson said, because the record failed to show that the employees ever intended to designate the Union as their bargaining agent, and because the changed work force was attributable to "extraordinary delays" for which Bryant was not the cause (Appendix A, *infra* p. 52); nor do Bryant's "minor" 1962 Section 8(a)(1) violations prevent the current holding of a fair election, Judge Anderson said, because the delays have provided more than ample time for any resulting prejudice to have been dissolved (Appendix A, *infra* pp. 58-59).

With respect to the Union's majority status, Judge Anderson said that the decisive question "is whether employees meant to make the union their representative by signing the cards, or whether they understood their actions only as a call for a secret ballot election."

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[7] Judge Anderson thus summarized the changed (1967) Bryant work force (Appendix A, *infra* p. 51): "After further delays at the hearing, the appeal to the Board, and finally the appeal here, sixty-two employees who signed cards in 1962 are no longer employed at respondent's plant and the size of the appropriate bargaining unit has grown from 337 to 456. Consequently a bargaining order makes the Union, by fiat, the representative of a unit, more than two-thirds of the members of which never had an opportunity to say whether they wanted such representation or not."

Under this test, Judge Anderson would have invalidated 19 cards because of representations made at the time they were signed that their purpose was to get an election or that there would be an election (Appendix A, *infra* pp. 53-55). And under these circumstances, including the fact that the "general atmosphere at the time of the campaign was clouded by election-oriented propaganda," Judge Anderson was of the view that it was not of controlling significance that the Union's lack of majority status had not been demonstrated conclusively. Instead, Judge Anderson said, "the burden should rest with the General Counsel to show by a preponderance of the evidence that the [employees'] subjective intent to authorize representation was not vitiated by such extreme circumstances" (Appendix A, *infra* p. 55).

REASONS FOR GRANTING WRIT

A. The Board has consistently held, with court approval, that an employer may be ordered to recognize and bargain with a union if it is found that the union had valid authorization cards from a majority of the employees and that the employer's refusal to recognize the union was not premised upon a good faith doubt as to the union's majority status.[8] In applying this rule, the Board states that it does not consider authorization cards to be valid where they have been obtained as the result of a misrepresentation as to the cards' purpose. See *Englewood Lumber Co.*, 130

[8] For example, *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F.2d 733, 741-742 (C.A.D.C.), *cert. denied*, 341 U.S. 914; *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 853 (C.A. 1); *Irving Air Chute, Inc.* v. *N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2); *N.L.R.B.* v. *Elliott-Williams Co.*, 345 F.2d 460, 463-464 (C.A. 7); and *Colson Corp.* v. *N.L.R.B.*, 347 F.2d 128, 138-139 (C.A. 8).

NLRB 394. However, in *Cumberland Shoe Corp.*, 144 NLRB 1268, *enforced*, 351 F.2d 917 (C.A. 6), the Board ruled that to invalidate an authorization card for a misrepresentation it must be established that the solicitor told the signer that the card would be used *only* to get a Board election. Thus, under the *Cumberland Shoe* test, it is not enough to show that the solicitor discussed the possibility of an election or that the signer was told that the card might be used for that purpose.

Two circuits—the District of Columbia Circuit and the First—have approved the Board's *Cumberland Shoe* rule. *United Automobile Workers* v. *N.L.R.B. (Preston Products, Inc.)*, —— F.2d —— (C.A.D.C.), 66 LRRM 2548, 2552-2553; *United Automobile Workers* v. *N.L.R.B. (Aero Corp.)*, 363 F.2d 702, 705-706 (C.A.D.C.), *cert. denied*, 385 U.S. 973; and *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 855-856 (C.A. 1).

Two circuits—the Sixth and Seventh—without explicitly rejecting it, have qualified their original approval of the *Cumberland Shoe* rule. Compare *N.L.R.B.* v. *Cumberland Shoe Corp.*, 351 F.2d 917, 920 (C.A. 6), and *N.L.R.B.* v. *Winn-Dixie Stores*, 341 F.2d 750, 754-755 (C.A. 6), *cert. denied*, 382 U.S. 830, with *N.L.R.B.* v. *Swan Super Cleaners, Inc.*, 384 F.2d 609, 615-620 (C.A. 6) ("... we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'this card is for the *sole* and *only* purpose of having an election' will a card be invalidated."). And compare also *N.L.R.B.* v. *Glasgow Co.*, 356 F.2d 476, 478-479 (C.A. 7), and *Happach* v. *N.L.R.B.*, 353 F.2d 629, 631 (C.A. 7), with *N.L.R.B.* v. *Dan Howard Manufacturing Co.*, —— F.2d —— (C.A. 7), 67 LRRM 2278,

2280-2281 ("We apply the statement in *Swan* of the *Cumberland* rule . . . .").

Two circuits—the Fourth and Fifth—have squarely rejected the *Cumberland Shoe* rule. *Crawford Manufacturing Company, Inc.* v. *N.L.R.B.*, 386 F.2d 367, 370-373 (C.A. 4)*; *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F.2d 482, 486-487 (C.A. 5); *N.L.R.B.* v. *Peterson Bros.*, 342 F.2d 221 (C.A. 5); *N.L.R.B.* v. *Lake Butler Apparel Company*, —— F.2d —— (C.A. 5, No. 24,687, March 25, 1968). The Eighth Circuit also appears to have rejected the rule. See *Bauer Welding and Metal Fabricators* v. *N.L.R.B.*, 358 F.2d 766, 774-776 (C.A. 8).

The opinions in this case reflect not only the divergent views among the circuits with respect to the *Cumberland Shoe* rule, but also conflicting decisions within the Second Circuit itself with respect to the rule. In the principal opinion in the case, Judge Hays appears to have relied squarely on the "sole purpose" test of *Cumberland Shoe*, which was approved by the Second Circuit in *N.L.R.B.* v. *Gotham Shoe Manufacturing Co.*, 359 F.2d 684, 686 (1966), to validate all the Union's authorization cards. Thus Judge Hays concluded on the basis of the *Cumberland Shoe* rule that, despite the evidence showing that the solicitation of cards was accompanied by representations that there would be an election and that the cards' purpose was to get an election, there had been no misrepresentation as to the cards' purpose. Judge Hays' opinion therefore is in accord with the view of

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* Now pending before the Court is a petition for certiorari filed by the Solicitor General, on behalf of the Board, to review the Fourth Circuit's decision in the *Crawford Manufacturing* case. No. 1050, October Term, 1967, *National Labor Relations Board, Petitioner* v. *Crawford Manufacturing Co., Inc., et al.*

the District of Columbia Circuit, as set forth in *United Automobile Workers* v. *N.L.R.B. (Preston Products, Inc.)*, *supra*, and *United Automobile Workers* v. *N.L.R.B. (Aero Corp.)*, *supra*, and the view of the First Circuit as set forth in *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, *supra*.

Judge Friendly, concurring, concluded that a "considerable number" of the Union's cards, but not enough to cancel the Union's majority, were invalid for proven misrepresentations by solicitors. In so concluding, Judge Friendly followed the Second Circuit's decision in *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F.2d 438, 441-445 (1967), which rejected the *Cumberland Shoe* rule and stated the contrary rule that cards are invalid if the signers were induced to sign by statements causing them to believe that the union would not achieve representative status without an election.[10] See also *N.L.R.B.* v. *Golub Corporation*, —— F.2d —— (C.A. 2, 1967), 66 LRRM 2769, which likewise rejects the *Cumberland Shoe* rule. Judge Friendly's opinion, accordingly, appears to be in close agreement with the view of the Sixth Circuit as set forth in *N.L.R.B.* v. *Swan Super Cleaners, Inc.*, *supra*,[11] and the view of the Seventh Circuit as

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[10] In *N.L.R.B.* v. *Golub Corporation*, —— F.2d —— (C.A. 2), 66 LRRM 2769, 2770, two judges (Judges Friendly and Anderson) set forth the view that where a pattern of misrepresentation by a particular solicitor as to the cards' purpose is shown, the General Counsel, in order to avoid an inference that similar conduct took place, should be required "to come forward with testimony by all signers." This formulation appears to be a corollary of the Second Circuit's *Nichols* rule.

In this case, Judge Friendly declined to apply the *Golub* rule.

[11] Judge Friendly stated as "inconsequential" the difference between the Second Circuit's test as set forth in the *Nichols*

set forth in *N.L.R.B.* v. *Dan Howard Manufacturing Co., supra.*

In his dissent, Judge Anderson, like Judge Friendly, applied the test set out in the Second Circuit's *Nichols* decision, and concluded that 19 of the Union's cards were invalid because of misrepresentations made at the time they were signed that their purpose was to get an election or that there would be an election. Because of the large number of invalid cards, as well as the Union's "election-oriented" propaganda, Judge Anderson would have required that it be shown by a preponderance of the evidence that the employees' "subjective intent" was to have the Union represent them without an election. In treating as material the employees' subjective reasons for signing cards, Judge Anderson's view accords with that of the Fourth Circuit as set forth in *Crawford Manufacturing Company, Inc.* v. *N.L.R.B., supra,* with that of the Fifth Circuit as set forth in *N.L.R.B.* v. *Peterson Bros., supra, Engineers & Fabricators, Inc.* v. *N.L.R.B., supra,* and *N.L.R.B.* v. *Lake Butler Apparel Company, supra,* and with that of the Eighth Circuit as set forth in *Bauer Welding and Metal Fabricators* v. *N.L.R.B., supra.* It is submitted that Judge Anderson's view is the proper one, and that the court below erred in holding that the Union's majority status had been demonstrated by valid authorization cards.

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case and the formulation of the Sixth Circuit in *N.L.R.B.* v. *Swan Super Cleaners,* 384 F.2d 609, 618, that "whatever the style or actual words of the solicitation, if it is clearly calculated to create in the minds of the one solicited a belief that the *only purpose of the card is to obtain an election,*" the card is invalid. [Emphasis in original.]

In its petition for certiorari in *Crawford Manufacturing Co., Inc.* (No. 1050, this Term, p. 14; see note 9, *supra*), the Board stated that in view of the divergent views among the circuits with respect to the *Cumberland Shoe* rule, it was appropriate for the Court to resolve the question. The three opinions in this case not only underscore the need for Supreme Court clarification, but reflect in a single case the entire spectrum of court opinion concerning the invalidation of authorization cards because of misrepresentations as to their purpose. This case, therefore, is a most appropriate instrument for the expression of the Court's judgment concerning the matter. For this reason, and also to rectify the error of the court below with respect to the Union's authorization cards, review should be granted.

B. As stated, when an employer refuses to recognize a union with majority status established through valid authorization cards, and that refusal is not based on a good faith doubt as to the union's majority status, the employer may be ordered to recognize and bargain with the union.[12] The issue concerning the circumstances that support an employer's claim of good faith doubt is directly related to the issue, discussed *supra*, pp. 17-22, concerning the circumstances connected with their solicitation that invalidate authorization cards; for both issues arise in the same context and each is a peg upon which an important principle under the Act depends. Moreover, as shown below, the issue with respect to the employer's good faith doubt is a recurrent one that has been the subject of extensive litigation.

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[12] See cases cited in note 8, *supra*.

In this case, the conclusion of the majority of the court below that Bryant did not have a good faith doubt concerning the Union's majority status was predicated solely on Bryant's "adamant position that it would not recognize a union without Board certification [after an election]." [13] As Bryant's position

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[13] Judge Hays, writing for the majority, concluded that other facts—Bryant's Section 8(a)(1) violations and its failure to suggest a card check—also evidenced lack of a good faith doubt; but Judge Friendly, concurring, expressly dissociated himself from reliance on these maters (Appendix A, p. 37, n. 1).

Reliance upon independent 8(a)(1) violations to show lack of a good faith doubt of majority status, as Judge Hays did here, has been criticized by courts and commentators alike. Other "unfair labor practices have a tendency to prove only the employer's opposition to the union's organizational effort; they throw no light on his belief or disbelief of the union's claim of majority status." *N.L.R.B.* v. *Logan Packing Co.*, 386 F.2d 562, 568 (C.A. 4). *Accord: N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 206-207 (C.A. 2); *Textile Workers Union of America* v. *N.L.R.B.*, 386 F.2d 790, 794 (C.A. 2); *Wausau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369, 373 (C.A. 7); *Lane Drug Co.* v. *N.L.R.B.*, —— F.2d —— (C.A. 6), 67 LRRM 2873; *People's Service Drug Stores* v. *N.L.R.B.*, 375 F.2d 551, 556 (C.A. 6); *Montgomery Ward & Co.* v. *N.L.R.B.*, 377 F.2d 452, 459 (C.A. 6); *N.L.R.B.* v. *Hannaford Bros. Co.*, 261 F.2d 638 (C.A. 1); *Edward Fields, Inc.* v. *N.L.R.B.*, 325 F.2d 754, 761 (C.A. 2); *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, 746 (C.A. 2) (per J. Learned Hand). *Cf. N.L.R.B.* v. *Sehon Stevenson & Co.*, 386 F.2d 551, 554 (C.A. 4). See Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 854-855, 858-859 (1967); Comment, 75 Yale L.J. 805, 828-831 (1966).

Nor is an employer's failure to suggest a card check indicative of a lack of good faith doubt. See *Textile Workers Union of America* v. *N.L.R.B.*, *supra*, 386 F.2d at 793: "There is equally little force in the union's argument that an employer cannot be held to have a good faith doubt when he rejects an

reflected its own past experience where unions had claimed card majorities but had nevertheless lost elections (J.A. 420-421, 437-438, 656-666), the majority's conclusion is inconsistent with decisions of other courts of appeals and of the Second Circuit itself plainly indicating that such experience "is a factor which must be considered in determining the good faith of an employer." *People's Service Drug Store* v. *N.L.R.B.*, 375 F.2d 551, 557 (C.A. 6). *Accord: Wausau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369, 373 (C.A. 7); *Textile Workers Union of America* v. *N.L.R.B.*, 386 F.2d 790, 793 (C.A. 2); *N.L.R.B.* v. *Johnnie's Poultry Co.*, 344 F.2d 617 (C.A. 8); *N.L.R.B.* v. *Hannaford Bros. Co.*, 261 F.2d 638 (C.A. 1); *Lane Drug Co.* v. *N.L.R.B.*, —— F.2d —— (C.A. 6), 67 LRRM 2873.

The conclusion of the majority below on the good faith doubt issue is inconsistent, moreover, with other court decisions establishing that an employer may, in the *absence of affirmative evidence* of a lack of a good faith doubt of the union's majority status, refuse to accept an asserted card majority and may instead insist upon an election. See *N.L.R.B.* v. *Logan Packing Co.*, 386 F.2d 562, 566 (C.A. 4) ("An employer could

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offer allowing him to examine authorization cards or to have a disinterested person do so. There is no need to cite the many cases in this court and others where a union with a majority of authentic cards has been found to lack a valid majority. Yet examination of the cards goes to only one element necessary to the union's majority status; it shows nothing on the equally important factor of how the cards were obtained." See also *Strydel, Incorporated*, 156 NLRB 1185, 1187: "Nor are we willing to infer . . . that Respondent was guilty of bad faith merely because it denied recognition while rejecting the Union's proposal for submission of the cards to impartial determination"; and *Lane Drug Co.* v. *N.L.R.B.*, *supra*.

not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily guillible and unimaginative, he will at least suspect unreliability in the cards and their signatures. If he has no honest doubt of the Union's claim of support by a majority of the employees, it will be because of other evidence known to him not because of the card check."); *Textile Workers Union of America* v. *N.L.R.B.*, 386 F.2d 790, 793 (C.A. 2); *Montgomery Ward & Co.* v. *N.L.R.B.*, 377 F.2d 452 (C.A. 6); *Wausau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369 (C.A. 7); *Don the Beachcomber* v. *N.L.R.B.*, —— F.2d —— (C.A. 9), 67 LRRM 2551. Indeed, the position of the Board itself is contrary to the holding of the court majority in this respect. As the Board stated in *Aaron Brothers Company of California*, 158 NLRB 1077, 1078:[14]

> Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards,

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[14] *Accord: Briggs IGA Foodliner*, 146 NLRB 443; *Cameo Lingerie, Inc.*, 148 NLRB 535; *Strydel, Incorporated*, 156 NLRB 1185; *John P. Serpa, Inc.*, 155 NLRB 99, *reversed*, 376 F.2d 187 (C.A. 9); *Mace Food Stores, Inc.*, 162 NLRB No. 153, 64 LRRM 1244. And see *H & W Construction Co.*, 161 NLRB No. 77, 63 LRRM 1346, 1348-1349, where the Board stated its general policy "that an employer who in good faith withholds recognition because of a doubt of majority, though his doubt is founded on no more than a distrust of cards, may have an election to resolve that doubt, and will not be subject to an 8(a)(5) violation simply because he is unable to substantiate a reasonable basis for his doubt."

rather than an election, as the method for determining the Union's majority.

Accordingly, consideration of the issue with respect to an employer's lack of good faith doubt should be undertaken by this Court not only because the decision of the majority below is inconsistent with other court and Board decisions, but also because this issue can best be delineated and examined in conjunction with the companion issue concerning authorization cards first discussed in this petition.

C. Even if Bryant unlawfully refused to bargain, there is serious doubt as to the propriety of the Board's order which unconditionally directs Bryant to bargain with the Union. Admittedly, this Court has indicated that where an employer has unlawfully refused to bargain with a union, the appropriateness of an unconditional bargaining order is not diminished by the lapse of time during which the unfair labor practices were being litigated or by the fact that the union may have, in the meantime, lost its majority support. See *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, n. 16.[15]

There are, however, special circumstances present in this case—impressive to two of the judges in the

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[15] See also *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702; *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; *N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563, 567-568; *Superior Engraving Co.* v. *N.L.R.B.*, 183 F.2d 783, 793 (C.A. 7), *cert. denied*, 340 U.S. 930; *N.L.R.B.* v. *Swift & Co.*, 162 F.2d 575, 583-585 (C.A. 3), *cert. denied*, 332 U.S. 791; *Semi-Steel Casting Co.* v. *N.L.R.B.*, 160 F.2d 388, 392-393 (C.A. 8), *cert. denied*, 332 U.S. 758. But *cf. N.L.R.B.* v. *Adhesive Products Corp.*, 281 F.2d 89 (C.A. 2), and *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, 289 F.2d 713 (C.A. 2).

court below [16]—which raise issues as to whether an exception should be created to the *Katz* rule. First, although the overall delay (four years by the General Counsel and the Board)[17] in processing the unfair labor practice case against Bryant was "inordinate," this is not the usual administrative case in which excessive delay taints agency action.[18] On the contrary,

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[16] In his dissent, Judge Anderson viewed the Board's bargaining order as not effectuating the policies of the Act and therefore violative of Section 10(c), and said that a new election should be ordered to protect the interests and rights of Bryant's employees (Appendix A, *infra* pp. 45, 50, 58). Supporting his view, Judge Anderson pointed to the "numerous delays attributable to the General Counsel, the Trial Examiner, and the Board" (Appendix A, *infra* p. 51), and noted that the delays had not only impeded Bryant in the presentation of proof supporting its position (Appendix A, *infra* p. 55, n. 8), but had also eventuated in a markedly larger work force and the departure from the force of a substantial number of employees who had signed cards in 1962 (Appendix A, *infra* p. 51).

Judge Friendly also saw "much force" to the position that a bargaining order was not an appropriate remedy, but deemed himself bound to enforce the Board's order by the decisions of this Court in *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, and *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, n. 16 (Appendix A, *infra* pp. 44-45).

[17] January 3, 1963—charge filed (J.A. 15)
June 10, 1964—complaint issued (J.A. 8)
July 28, 1964—hearing opened (J.A. 650)
October 9, 1964—hearing closed (J.A. 650)
June 4, 1965—Trial Examiner's decision issued (J.A. 751)
October 4, 1966—Board decision issued (J.A. 764).

[18] In *N.L.R.B.* v. *Katz*, *supra*, the interval between the filing of the charge and the issuance of the Board's decision was approximately 31 months (see 126 NLRB 297), in *Franks Bros. Co.* v. *N.L.R.B.*, *supra*, there was a seven-month inter-

this is a case in which the General Counsel of the Board deliberately chose not to uphold a Regional Director's clearly correct action under a controlling Board rule (*Aiello Dairy Farms*, 110 NLRB 1365), in which there was a protracted period of delay to await Board action in another case involving the rule, and in which a complaint was subsequently issued but only after a Board pronouncement (*Bernel Foam Products Co., Inc.*, 146 NLRB 1277) that the applicable rule had been changed. Thus this is a case that poses a basic issue concerning the propriety of the General Counsel's action in deliberately "deferring" required action for more than 15 months—a significant portion of the overall delay—in order to prosecute a charged party under a subsequently changed rule of law. And secondly, as Judge Anderson stated (Appendix A, *infra* p. 52), this is not a case in which an employer refuses to bargain with a union that "had been once validly designated by the employees as their representative" but has subsequently been repudiated by the employees; on the contrary, this is a case where the employer is charged with a refusal to bargain with a union that had decisively lost a Board-conducted election and there is a serious question as to whether the employees ever intended to designate the Union as their bargaining representative.

Finally, the question is presented as to whether the footnote statement in *N.L.R.B.* v. *Katz*, *supra*, is to be accorded the sweep attributed to it by the majority of the court below—that is, whether procedural delays in the processing of unfair labor practice cases may

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val between the filing of the charge and the issuance of the complaint, and a seven-month interval thereafter before the issuance of the Board's decision (see 321 U.S. at 708).

never be taken into account even though they may result in the infringement of employee rights.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 15, 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25—September Term, 1967.

(Argued October 2, 1967

Decided December 12, 1967.)

Docket No. 30844

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BEFORE:

FRIENDLY, HAYS and ANDERSON,
Circuit Judges.

Petition to review and set aside an order of the National Labor Relations Board based upon a decision that petitioner violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5), by interfering with its employees in the exercise of their right to join a union and by refusing to bargain with the union chosen by a majority of its employees to represent them in collective bargaining. The Board requests enforcement of its order.

Petition denied and order enforced.

KENNETH C. MCGUINESS, Washington, D. C. (Vedder, Price, Kaufman, Kammholz & McGuiness, on the brief), *for Petitioner.*

GEORGE B. DRIESEN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Peter Ames Eveleth, Attorney, on the brief), *for Respondent.*

HAYS, *Circuit Judge*:

Petitioner asks us to review and set aside an order of the National Labor Relations Board based upon a finding that petitioner violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (a)(5).[1] The Board seeks enforcement. We deny the petition and enforce the order.

The Board held that petitioner violated Section 8(a)(1) of the Act by threatening employees, by granting benefits to discourage joining the union, by coercive interrogation and by encouraging employees not to cooperate with the Board in the investigation of unfair labor practices. The Board held that peti-

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[1] (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

tioner violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the union.

The union involved is the United Electrical, Radio and Machine Workers of America (UE) Local 218. The plant of the employer at which the unfair labor practices occurred is located in Springfield, Vermont.

In May 1962 the union undertook a campaign to organize petitioner's employees. By August 14 the union had authorization cards from 198 of petitioners' 337 bargaining unit employees. On that date the union notified the employer by letter that it represented a majority of the employees and asked for a bargaining meeting. The petitioner replied to the union's letter declining to meet with the union and stating the company's "very definite policy" of refusing recognition in the absence of Board certification. The employer then began a campaign of vigorous opposition to the union, carried on largely by letters and notices to the employees. In the meantime the union had filed a representation petition with the Board.

Interrogation

A number of employees were questioned by supervisory officials as to their attitude toward the union. The Board could properly find that this interrogation was coercive since it took place in an atmosphere of active opposition to the union, *Bourne* v. *N.L.R.B.*, 332 F.2d 47, 48 (2d Cir. 1964), without explanation to the employees of the purpose of the questioning and under circumstances indicating that it had no legitimate purpose, *Edward Fields, Inc.* v. *N.L.R.B.*, 325 F.2d 754, 758-59 (2d Cir. 1963) and was unaccompanied by any assurance against reprisals, see *N.L.R.B.* v. *Lorben Corporation*, 345 F.2d 346, 348

(2d Cir. 1965). Numerous instances of questioning involved particularly threatening connotations because employees were interrogated in connection with interviews concerning eligibility for merit increases.

Threats

There was substantial evidence to support the Board's finding that the employer threatened employees with reprisals. Questioning of employees as to union activity in connection with discussion of merit increases, referred to above under "Interrogation" could well have been considered by the employees to carry with it the implication that those who favored the union would not receive an increase. One of the supervisors, when he learned that an employee was a member of the union organizing committee asked him, "Do you like your job?" On another occasion a supervisor told an employee that if the union won he could not be transferred from one job to another when work was slack but would be sent home.

Benefits

During the period prior to the representation election the employer announced an increase in pension benefits. The announcement was coupled in an advertisement published in the local newspaper and in a notice sent to employees with material urging employees to vote against the union. The Board could properly hold that this promise of benefit was a violation of Section 8(a)(1). *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *N.L.R.B.* v. *D'Armigene, Inc.*, 353 F.2d 406, 408 (2d Cir. 1965).

Dissuading employees from cooperation with the Board

We are agreed that the Board could properly find that the employer violated the Act by posting a notice to employees stating that they were under no obligation to assist the Board in connection with its investigation of unfair labor practice charges, and that they did not "have to talk with these people." This notice accompanied by the employer's assurance that it would resist the Board's efforts "with every force available to free men," constituted an unjustified obstruction of the Board's processes. See *Henry I. Siegel Co.* v. *N.L.R.B.*, 328 F.2d 25, 27 (2d Cir. 1964).

A majority of the court believes that the Board's finding of violation in the employer's reinterviewing the employees who testified at the Labor Board hearing between their direct and cross-examination was unjustified. This determination requires no modification of the Board's order.

Refusal to Bargain

The Board's finding that on August 14, 1962 when the union wrote to the employer to request bargaining, the union had a majority of the employees is supported by substantial evidence in the record. See *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966).

The authorization cards signed by the employees were free from ambiguity.[2] The evidence credited by

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[2] I hereby request and accept membership in the above named union, and authorize it to represent me, and in my behalf to negotiate and conclude all agreements as to hours of labor, wages and all other conditions of employment.

the Board, and therefore accepted by us, see *N.L.R.B.* v. *Warrensburg Board & Paper Corporation*, 340 F.2d 920, 922 (2d Cir. 1965), established that the union's organizers made no misrepresentations to the employees as to the purpose of the cards and the effect of their signatures. Indeed the record shows that a representative of the union correctly explained to the employees at the first organizational meeting the methods by which recognition could be attained and at no time were the employees told that the sole purpose of signing the cards was to secure an election. See *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, *supra*; *N.L.R.B.* v. *S. E. Nichols Company*, 380 F.2d 438, 444-45 (2d Cir. 1967).

There is also adequate support for the Board's conclusion that the employer did not have a good faith doubt of the union's majority status. Not only did the employer not suggest a card check but it rejected the possibility that such a verification would be acceptable by announcing its "very definite policy" of refusing any evidence of representational rights other than a Board certification.

The history of violations of Section 8(a)(1) is sufficient to establish that the employer deliberately destroyed the union's majority and the Board's order to bargain is an appropriate method of correcting this default. *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944); *N.L.R.B.* v. *International Union, Progressive Mine Workers*, 375 U.S. 396 (1964) (reversing *per curiam* 319 F.2d 428 (7th Cir. 1963) which directed an election because such a long period of time had passed since the union had attained its majority status).

The General Counsel's Delay in Issuing the Complaint

The General Counsel delayed issuing the complaint for about 15 months while awaiting a Board decision clarifying the rule as to sustaining Section 8(a)(5) charges where the union has participated in an election and lost. Mere delay in the issuance of the complaint is insufficient ground for the denial of relief.

> "The company urges that, because of the lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order, and because the union was repudiated by the employees subsequently to the events recounted in this opinion, enforcement should be either denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as a bargaining representative. The argument has no merit. *Franks Bros. Co.* v. *Labor Board*, 321 U.S. 702; *Labor Board* v. *P. Lorillard Co.*, 314 U.S. 512; *Labor Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568. Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748 n. 16 (1962).

We have examined the other points made by the petitioner and find them to be without merit.

Petition denied. Order enforced.

FRIENDLY, *Circuit Judge* (concurring in the result):

This case does not have the simplicity for me that it does for my brother Hays. Being asked to enforce an order requiring recognition of a union more than

five years after the organizing campaign is enough in itself to arouse serious qualms. These are compounded by the circumstances that the inordinate delay was almost wholly attributable to the Board—more than 15 months of it a deliberate one by the General Counsel; that the union's card-count majority was small and doubtful on any view; that there has been a considerable turnover in the employees; and that nothing now stands in the way of a fair election. If we were free to decide the case in accordance with our own notions of good sense, I would unhesitatingly join my brother Anderson in denying enforcement of the bargaining order. But I cannot find sufficient legal basis for refusing to grant enforcement, distasteful though that is.

The two most important objections to enforcement of the bargaining order are the arguments that the union lacked a valid majority [1] and that even if it did, the order is an inappropriate remedy under the peculiar circumstances.

In *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F.2d 438, 441-45 (2 Cir. 1967), we rejected the rule announced by the Board in *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), enforced 351 F.2d 917 (6 Cir. 1965), that an authorization card "clear" on its face could be invalidated for misrepresentations as to its pur-

[1] While I agree with Judge Hays that General Counsel sustained his burden of negating good faith doubt, I do this solely on the basis of Bryant's adamant position that it would not recognize a union without Board certification, and dissociate myself from what is said as to the bearing of its rejection of a card check and of its violations of § 8(a)(1). See *NLRB* v. *River Togs, Inc.*, 382 F. 2d 198, 206-07 (2 Cir. 1967); *Textile Workers of America* v. *NLRB*, —— F. 2d —— (2 Cir. 1967).

pose only by proof that the solicitor had said that the "sole" purpose of the card was to secure an NLRB conducted election; we held that cards were invalid if "signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." Our decision has already become the subject of consideration by the Sixth Circuit, *N.L.R.B.* v. *Swan Super Cleaners*, —— F.2d —— (1967), and the District of Columbia Circuit, *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers* v. *N.L.R.B. (Preston Products Co.)*, —— F.2d —— (1967). The Sixth Circuit, which we had thought, 380 F.2d at 444, committed to the Board's narrow *Cumberland* rule, now has disclaimed any such commitment, declaring that "whatever the style or actual words of the solicitation, if it is clearly calculated to create in the minds of the one solicited a belief that the *only purpose of the card is to obtain an election*," the card is invalid. The difference between this and our formulation is inconsequential in most instances, as evidenced by the Sixth Circuit's apparent agreement, with the result we reached in *Nichols*. On the other hand, a divided court in the District of Columbia Circuit has adhered to the Board's *Cumberland* rule which makes everything turn on the *solicitor's* use of "only" or a synonym.

The *Preston* opinion does not explain why misrepresentations to employees that card signatures will not suffice to require the employer to grant the union a seat at the bargaining table as their exclusive agent should be disregarded unless the solicitor can be proved to have said *in ipsissimis verbis* that the sole purpose of the cards is to procure an election. As Judge O'Sullivan aptly wrote in *Swan Super Clean-*

ers, Inc., supra, —— F.2d at ——, "A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words*—'sole' and 'only'—employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed up for."[2] While the *Preston* opinion expresses concern that a contrary course "would require us to examine all relevant testimony in detail, to adjudge the credibility of each witness, and to weigh the evidence," this could hardly have meant that the *Cumberland* rule avoids these tasks; it simply narrows the scope of inquiry to whether the solicitor used a particular form of words. Furthermore, as the court was of course aware, judges reviewing agency action do not "adjudge the credibility of each witness" or "weigh the evidence." While ease of review is indeed desirable, this can never justify narrowing the inquiry to eliminate relevant facts; here, as in *N.L.R.B.* v. *United Steelworkers of America,* 357 U.S. 357, 364 (1958), mechanical answers will not "avail for the solution of this non-mechanical, complex problem in labor-management relations." The extensive discussion of evidence in such cases as

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[2] "A sophisticated and only modestly talented union agent" could still more easily conform his testimony to the "sole purpose" standard, even without conscious prevarication. While it is true, as emphasized by Judge Wright in *Preston,* that the evidence of "employees testifying under the eye of the company officials," —— F. 2d at ——, is somewhat suspect, there is no reason to suppose the testimony of union organizers is any less so. So far as memory is concerned, an employee would seem rather more likely to be able to recall what was said to him than an organizer would be to remember what he said to each of scores of employees in many campaigns ranging over months, or, as here, years.

Nichols and *Swan Super Cleaners* was necessitated by the Board's use of the wrong standard and the courts' desire to avoid a time consuming remand; once the Board adopts the proper standard, judicial review under *Nichols* or *Swan Super Cleaners* should not be substantially more difficult than under the District of Columbia rule. Moreover, the supposed administrative advantage of the latter largely vanishes in light of the court's appropriate concession that the simplistic *Cumberland* rule would be inapplicable if the evidence revealed "gross misrepresentations as to the union's intention with respect to an election," and that "*Cumberland* does not articulate an absolute rule, but rather a useful and well-founded rule of thumb." What would truly ease the administrative problem both for the Board [3] and for the courts would be for the Board to use its long neglected rule-making power [4] and specify what a union authorization card should say and how.

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[3] The percentage of unfair labor practice charges filed against employers containing § 8(a)(5) allegations has risen from 28.5% in the year ended June 30, 1964, when *Bernel Foam Products Co., Inc.*, 146 N. L. R. B. 1277, was decided, to 35.0% in the year ended June 30, 1966, and the General Counsel has reported that over 40% of the hearings held during fiscal 1966 involved § 8(a)(5), 64 LRRM 181, 191. See Suggested Changes in NLRB Labor Relations Board Procedures, Report of Commitee on Labor and Social Security Legislation of Ass'n of the Bar of the City of New York, Table D (1967). The General Counsel has pointed out that cases like the present "normally involve complex fact and legal issues and require more Regional Office time and manpower to investigate and process." 64 LRRM 181, 186.

[4] See *Int'l Union of Operating Engineers, Local 49* v. *NLRB*, 353 F. 2d 852, 856 (D. C. Cir. 1965); Peck, The Atrophied Rule-Making Powers of the NLRB, 70 Yale L. J. 729 (1961); 16 Admin. L. Rev. 77 (1964); 1 Davis, Administrative Law Treatise § 6.13, pp. 147-50 (1965 pocket part).

I agree with Judge Anderson that a considerable number of cards must be invalidated for proven misrepresentations by solicitors [5] but that this still leaves

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[5] The testimony given by employee Broderick, after the Board had reversed the Trial Examiner's ruling which had forbidden inquiry into the circumstances of the signatures, illustrates the morass of confusion produced by the authorization card procedure as now sanctioned:

"Q. (By Mr. McGuiness, Company Counsel) Would you please tell us in your own words the circumstances surrounding the signing of the card, including what was said at that time? A. Well I was offered a card and asked if I would sign up, sign a card. The reason was that if they had enough cards in, there would be a union election to form a union. So I did.

* * * *

Q. Now, do I understand your testimony to be, Mr. Broderick, that there was general talk in the plant about the purpose of signing the cards? A. Yes, the purpose that I mentioned; I thought I mentioned that if we were to have enough cards in, it would call for an election.

Mr. McGuiness: The following questions are for the purpose of making an offer of proof.

Q. (By Mr. McGuiness) What was your understanding then of the effect of the signing of the card, Mr. Broderick? A. What was my understanding?

Q. Yes. A. You mean my own understanding?

Q. Yes, your personal understanding of what the card meant. A. To form a union.

* * * *

Q. (By Mr. McGuiness) Was it your understanding, Mr. Broderick, that the card could be used to establish a union in the plant without an election? A. My understanding? No, sir. My understanding was that we had to have the majority of cards for the union to win.

Q. Well, did you understand there was to be an election or not from the cards? A. Yes, if there was enough signed cards placed there, they would hold an election.

[Footnote continued on page 42.]

the Union with a majority. Where I am unable to follow him is in his view that other circumstances cast on the General Counsel a burden that would not otherwise have existed. The August 3 handbill was indeed misleading; while it stated "your card is your

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[5] [Continued]

* * * *

Q. (By Mr. Panos, for General Counsel) Mr. Broderick, I believe you testified you don't recall who it was that said to you something prior to your signing your card? A. No, I don't recall who it was, no.

Q. And would you tell us again what was said to you, if anything? A. Yes, if I can recall. It was that if there was enough signed cards, enough fellows their [sic] signed cards, it could hold an election.

* * * *

Q. Were you ever told that one of the purposes of signing the card was to show your support for the union? A. Well, I was asked to sign the card to support the union and I did it. That is the best way I can explain it to you.

Q. Sir? A. I did sign the card to support the union. I don't know whether those same words were ever put to me or not.

* * * *

Trial Examiner: Let me follow up with a question. You said you don't know whether those words were put to you?

The Witness: Well, the only way I can explain it to you, I mean, if I signed the card, my idea in my own mind is I was supporting the union by signing the card. I agreed with it to sign the card to call for an election. I just figured—that is what I am trying to tell you. I must have known I was supporting the union.

Trial Examiner: You don't mean that anybody told you to sign the card in support of the union or anything to that effect?

[Footnote continued on page 43.]

written pledge that you want UE Local 218 at Bryant," this was followed immediately by language indicating that the card was simply a pledge to vote for Local 218 at an election. However, the joint appendix does not inform us how many cards were signed in reliance on the handbill; the signing had begun at the end of May and the Board credited testimony of the chief organizer that he had explained at meetings from the outset that if the Union achieved a majority status which the Company refused to recognize, the Union could file charges. We are pointed to no evidence that a particular solicitor had engaged in mis-

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[5] [Continued]

> The Witness: Well, I don't know. I don't think I had been told that. If I signed the card willingly, I must have —it must have been in my opinion that— that is the way I tried to explain it. I must have known what I was doing if I did sign it at that time.
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> * * * *
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> Q. (By Mr. Panos) Mr. Broderick, were you ever told that the only reason you should sign the card, single and only reason that you should sign the card, was in order to get an election? A. Well, I wasn't pointed out singularly; I think the way it was explained to me if we had enough cards in, we could hold an election.
>
> Q. So, is it your testimony that signing the card, that one of the purposes of signing the card was to get an election? A. Yes, sir.
>
> Q. And is it your testimony that by signing the card that getting an election was not the only purpose as was said to you, that it was not the only purpose? A. I don't know what you mean by that, sir.
>
> Q. Well, you have told us that you were told that signing the card was to get an election, but that was not the only reason you were told that you should sign the card; is that correct? A. That is the only reason I was told. That is all I heard about it. You put a card in and you can hold an election if there are enough.
>
> * * * *"

representation in so large a proportion of his solicitations as to require General Counsel to produce all his solicitees in order to avoid the otherwise reasonable inference of similar conduct. See *N.L.R.B.* v. *Golub Corporation*, —— F.2d ——, —— (2 Cir. 1967); Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, 857-58 (1967); cf. *N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743, 748 (2 Cir. 1953). Though there was a two-year lag between events and hearing, 15 months of which were attributable to the deliberate decision of the General Counsel, it is unclear how much the excess of this delay over the normal four or five months[*] added to Bryant's problems of proof, and Bryant's own conduct, as depicted in the portion of Judge Hays' opinion headed "Dissuading employees from cooperation with the Board," is subject to criticism.

While there is much force in Judge Anderson's position that even if the Union had a valid majority, a bargaining order is not an appropriate remedy under the unusual circumstances here presented, I find difficulty in believing the controlling decisions of the Supreme Court cited in both opinions leave us free to hold this. *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 704 (1944), itself involved refusal to bargain with a union seeking initial recognition on the basis of a card count. While it may be distinguished since here the much longer delay was not "necessary *fairly* to determine the charges of unfair labor practices," *Id.* at 705 (emphasis supplied), the Court's latest expression on the subject, in *N.L.R.B.* v. *Katz*, 369 U.S. 739,

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[*] See the report cited in note 4, Table G.

748 fn. 16 (1962),[7] was couched in terms so strong that to impose an exception requires more boldness than I possess.

I thus reluctantly concur in the enforcement of what seems to me an exceedingly ill-advised order.

ANDERSON, *Circuit Judge* (dissenting):

Under the peculiar circumstances of this case, I think a bargaining order, by imposing on respondent's employees a form of representation concerning which a substantial majority has never had an opportunity to express a preference, disregards the employees' § 7 rights, and undermines the most fundamental policies of the Act. Accordingly I dissent from its enforcement, and would order that a new election be held.

The Union lost an election at Bryant in 1959. When it opened its organizing campaign at respondent's plant in May of 1962, it immediately made known its purpose to sign up enough employees so that this time it would win the election. Many of the employees had experienced previous union campaigns at Bryant in

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[7] "The company urges that, because of the lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order, and because the union was repudiated by the employees subsequently to the events recounted in this opinion, enforcement should be denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as a bargaining representative. The argument has no merit. Franks Bros. Co. v. NLRB . . . . Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)."

1956 and 1959, each of which had culminated in a Board-conducted secret ballot election. From the start there were clear indications that this drive would follow the same pattern, and the general talk around the plant was that there would have to be an election to determine the question of recognition.

The Union and its organizers were in no small part responsible for the general impression that the Union could not get in without first winning an election. The Trial Examiner found that Union leader Harley had "made it known that he contemplated that an election would have to be held in order to obtain recognition," and that there was talk of this at Union meetings and in conversations with individual employees. Although Harley testified that he had explained at one of the meetings all the ways in which the Union might gain recognition, whatever he said apparently made no lasting impression on the employees.[1]

The Union advertised that it needed enough signed authorization cards to petition the Board for an election, and that, by the beginning of August, it was making good progress in reaching this goal. Many of the employees who signed were expressly told at the time that the purpose of the card, which was of the standard variety used in these campaigns, was to bring about an election. Some were assured that they need not, therefore, pay any attention to what

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[1] At the hearing each employee was asked on cross-examination if he had been "told at any time that the Union would use your card to bring the Union into the plant without an election?" to which the answer was invariably in the negative. Cf., *NLRB* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2 Cir. 1966). Most had not heard of such a use for the card until after the hearing had begun.

was printed on the face of the card. A few others were warned that if they did not sign a card at that time it would cost an extra $40 or $50 to join the union if it won the election. No one was told, on the other hand, that the Union might seek recognition on the basis of the cards alone, without first having a vote.[2]

On August 3 the Union distributed a handbill which was headed: "UE 218 ORGANIZATION FOR NLRB ELECTION MAKING GOOD PROGRESS." The handbill, which had been prepared by Harley, then stated the two purposes of the authorization cards—first, "to get an election," and, second, to assure the Union that it would have enough votes to win the election. It concluded with an exhortation to the employees to "SIGN A CARD." In the next few days additional cards were solicited and signed, and by August 14, 1962, the Union had a total of 198 signatures from a work force of 337.

On August 17, the Company refused to recognize the Union on the strength of its asserted card majority, and insisted that the question of representation be settled in a Board-conducted election. This was no surprise to the Union which, without waiting for the Company's answer, had filed an election petition with the Board. For three months thereafter, both the Company and the Union waged a vigorous campaign to capture the employees' support at the upcoming secret ballot election. Then, on November 1, 1962,

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[2] Such "half-truths" are likely to give employees the "false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth." *NLRB* v. *S. E. Nichols*, 380 F. 2d 438, 445 (2 Cir. 1967).

the votes were cast and counted and the Union was defeated 184 to 124.

Objections were filed by the Union and the results of the election were set aside on December 18, 1962, and a new election was ordered by the Board's Regional Director. Thereafter, the Union withdrew its petition for an election, and on January 3, 1963 filed unfair labor practice charges alleging that certain pre-election conduct on the part of the respondent had violated § 8(a)(1), and that its refusal to recognize the Union on August 17 had violated § 8(a)(5).

The Regional Director refused to issue the § 8(a)(5) complaint, apparently relying on *Aiello Dairy Farms*, 110 N.L.R.B. 1365, which stood for the then applicable Board doctrine that, by submitting to a secret ballot election, a union waived its right to assert an antecedent refusal to bargain against an employer who wins the election. On March 13, 1963, the Union appealed this decision to the Board's General Counsel in Washington, where the case then rested for some fifteen months.

At the time the Union filed its appeal, the General Counsel was aware that the *Aiello* rule was being challenged in *Barker's East Main Corp.*, 142 N.L.R.B. 1194, then pending before the Board, and this prompted him to withhold immediate action in the present case. The *Barker's* decision did not overrule *Aiello*, but the General Counsel was still of the opinion that he could bring about the change, and, with that in view, he selected a few cases which might squarely raise the issue before the Board. His objective was finally achieved in the Board's decision in *Bernel Foam Products Co., Inc.*, 146 N.L.R.B. 1277, which overruled *Aiello* and paved the way for issuance of

the § 8(a)(5) complaint against respondent on June 5, 1964, nearly two years after the alleged violation of the Act.

The progress of the present case was equally deliberate. The hearing, which commenced on July 28, lasted for over two months. Since the Company challenged the validity of many of the authorization cards on which the Union relied to establish itself as bargaining representative, the hearing necessarily involved the examination and cross-examination of a great number of witnesses. But the delay was principally caused by the Trial Examiner who, in an erroneous ruling, refused to permit the employer to cross-examine witnesses. This resulted in an interim appeal to the Board, an adjournment to study the proper procedure by which over two hundred witnesses should be recalled for cross-examination, and the time consumed in recalling and cross-examining them. The Trial Examiner then took eight months in reaching her decision and the Board added four more. This appeal was finally argued almost five full years after the 1962 election.

In its answer to the unfair labor practice charges, respondent challenged the authority of the General Counsel to issue the complaint after having deliberately withheld action for fifteen months while the Board changed the law. The Trial Examiner and a majority of the Board were of the opinion that neither respondent nor its employees had suffered prejudice as a result of the unusual procedure which was followed.[3] Noting that a secret ballot election is "nor-

[3] Board Member Jenkins dissented on this point, saying:

"Delays of this character in the administrative process are unfair and unduly burdensome to the parties. . . .

[Footnote continued on page 50.]

mally the best method of determining whether or not the employees desire to be represented by a bargaining agent," the Board then concluded that violations of § 8(a)(1) by the respondent during the 1962 election campaign precluded the holding of a fair election at the time of the decision and ordered that the respondent recognize the Union on the strength of the cards in order to effectuate the policies of the Act. The Board's order is dated October 3, 1966.

Under § 10(c) the Board is empowered to take such affirmative remedial action as will effectuate the policies of the Act. In some cases involving § 8(a)(5) violations the bargaining order remedy "may be thought uniquely appropriate," *N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74, 79 (2 Cir. 1965), and it is settled that the Board has considerable discretion in the exercise of its remedial function.[4] But this does not mean that it is free to impose a remedy merely "on the basis of experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act," *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953), which, in my view, is precisely what the Board has done here.

One objective of the Act is to guarantee that employees have freedom of choice on the question of

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[3] [Continued]

Lapse of time obscures the facts and makes them more difficult (and expensive) to ascertain."

The record in this case amply illustrates these observations.

[4] § 10(c) authorizes the Board to "take such affiramative action . . . as will effectuate the policies of this Act," and thus defines a wide area of discretion to devise remedies within the stated objective. E.g., *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177 (1941).

union representation. That policy is reflected in the right to organize granted by § 7 of the Act, and in the 1947 amendment to that section which expressly adds the right to decline any form of organized representation. The obvious design of the amendment was to "permit employees—as distinguished from boards and unions—to choose their own bargaining agent," *N.L.R.B.* v. *Red Arrow Freight Lines*, 180 F. 2d 585, 586 (5 Cir.), *cert. denied* 340 U.S. 823 (1950), and to "prevent forcing the unwilling worker into a union," *N.L.R.B.* v. *International Union, United A., A. & A. I. Wkrs.*, 320 F.2d 12, 15 (1 Cir. 1963).

Despite the Board's "no prejudice" observation, I am convinced that a bargaining order, imposed nearly five years after the Union was rejected in a secret ballot election and after numerous delays attributable to the General Counsel, the Trial Examiner and the Board, will work an injustice on a substantial portion of the employees at respondent's plant by depriving them of the right of free choice guaranteed under § 7. While the General Counsel awaited a change in the law so that he might prosecute this case against respondent, the composition of the Bryant work force was naturally undergoing change. After further delays at the hearing, the appeal to the Board, and finally the appeal here, sixty-two employees who signed cards in 1962 are no longer employed at respondent's plant and the size of the appropriate bargaining unit has grown from 337 to 456. Consequently a bargaining order makes the Union, by fiat, the representative of a unit, more than two-thirds of the members of which never had an opportunity to say whether they wanted such representation or not.

This case stands on a different footing from those where an employer has refused to bargain with a duly authorized representative of the employees on the ground that the union may no longer represent a majority of the work force. Where a union has once been validly designated as bargaining representative, it would be a clear subversion of the decertification procedures of § 9(c) to permit the employer to qualify its bargaining obligation by demanding periodic reconfirmation of the union's majority status. *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950). Thus, there is good sense to the rule that a "bargaining relationship . . . once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 705 (1944). These cases, as well as others cited there and in the Court's opinion,[5] all involved unions which had been once validly designated by the employees as their representative. They are not apposite here where the record fails to show that the employees ever intended to designate the Union as their bargaining agent, and where the changed work force is attributable to extraordinary delays of which respondent was in no part the cause. Cf. *Franks Bros. Co.* v. *N.L.R.B.*, *supra*.

There is no dispute that on August 14, 1962, 198 of 337 eligible Bryant employees had signed union authorization cards. But that does not alone establish the Union's entitlement to recognition where the record shows that cards were obtained by fraud, co-

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[5] *NLRB* v. *P. Lorillard Co.*, 314 U. S. 512 (1942); *NLRB* v. *Katz*, 369 U. S. 736 (1962); *NLRB* v. *International Union, Progressive Mine Workers of America*, 375 U. S. 396 (1964).

ercion, or misrepresentation. *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2 Cir. 1966). For instance, a card cannot be counted where the employee signing the card has been told by the person soliciting his signature on behalf of the union organizers, that the "sole purpose" is to bring about a secret ballot election, nor is a finding of invalidity limited to such cases. It is recognized that deceptive and devious tactics have become the hall-mark of card campaigns, see Note, *Union Authorization Cards*, 75 Yale L. J. 805 at 823-828 (1966), and this fact of life in labor-management relations calls for the rejection of the "sole purpose" test as the exclusive means of invalidating a union card, *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F.2d 438, 444-445 (2 Cir. 1967), a result which we thought would invest words such as "sole," "merely," "just" or "only" with a "kind of talismanic quality." *N.L.R.B.* v. *Golub Corp.*, —— F.2d —— (2 Cir. 1967).

Although this court has not gone so far as to sanction the investigation of an employee's subjective intent in signing a card where there has been no form of misrepresentation made in its acquisition, it has clearly stated that the decisive question in these cases is whether the employees meant to make the union their representative by signing the cards, or whether they understood their actions only as a call for a secret ballot election. *N.L.R.B.* v. *S. E. Nichols*, *supra*, at 444. In my view, this record compels the latter conclusion; certainly the General Counsel has not achieved his burden of proving the contrary by "substantial evidence."

The Examiner counted the cards of twelve employees which Bryant claimed had been signed only after a specific union organizer had represented that the purpose of the card was to get an election. She relied

on the fact that these employees had not been told that the "sole" purpose of the card was to get an election, a legal premise which, it is now clear, is not the law of this circuit, and, in some instances, she based her ruling on the ground that the solicitor "had no authority to speak as an agent of the Union," which is also a consideration we have deemed immaterial so long as the speaker is actively engaged in the solicitation of union cards. See *N.L.R.B.* v. *Golub Corp.*, *supra*, n. 6 at . Of those twelve cards, at least eight are clearly invalid and cannot be counted.[8]

The Examiner gave "no weight" to the testimony of some fifteen other employees who were told before signing that the purpose of the cards was to get an election, primarily because those witnesses were unable to recall who had made the representation, or whether the speaker was an "authorized union solicitor." The inability of the employees to recall what the Examiner considered to be vital details was due to the delay in the commencement of the hearing, for

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[8] These are the cards of Davidson, Davis, Gray, Hall, Sherer, Westcott, Morris and Perry. The Examiner assumed, without deciding, that the later two cards should not be counted. The testimony is enlightening: *Davidson:* "He said the card stood for the purpose of an election . . . just for an election. . . . I pointed out what the card read to him and he said for now not to pay any attention to that."; *Davis:* He "told me that if I signed the card there would be an election."; *Gray:* "How about signing a card so we can get an election in the shop?"; *Sherer:* "I was just asked if I would sign one so they could get a majority of cards to get an election. . . . Well, I knew what it meant. I knew it was a union card meaning an election."; *Westcott:* "He told me what the purpose was, to bring an election."; *Morris:* "Because he told me it was to get an election. There was nothing else that would come out of the cards whatsoever. There was no other purpose."; etc. etc.

which the General Counsel was responsible. In any event it was sufficient if the representation was made by someone who was soliciting his signature on a card. Accordingly, eleven of these cards should be invalidated because of representations, made at the time they were signed, that there would be an election.[7]

Under the circumstances of this case, respondent's failure to show conclusively that ten additional cards were obtained by misrepresentation or coercion is not of controlling significance.[8] Where a card majority is reasonably challenged, and where despite the fact that evidence has gone stale, that challenge is supported by proof that as many as nineteen cards are invalid and that the general atmosphere at the time of the campaign was clouded by election-oriented propaganda, the burden should rest with the General Counsel to show by a preponderance of the evidence that the subjective intent to authorize union representation was not vitiated by such extreme circumstances. Cf. *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F.2d 482, 487 (5 Cir. 1967).

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[7] These are the cards of Broderick, Holden, Yessman, Bohen, Delehanty, O'Hara, White, Hoyt, Burbank, LeMere and Lynch. Examples: *Broderick:* "I think the way it was explained to me [was] if we had enough cards in we would hold an election. . . . That is the only reason I was told."; *Delehanty:* "You have to sign the card to get in; . . . you have to have an election to get the union in."; *Yessman:* "That is right. That was the purpose. . . . Well, they needed a majority of cards to hold an election."; *Bohen:* "That it was for an election."; etc., etc.

[8] This failure of proof at the hearing was due in large part to the fact that the intentional delay by the General Counsel put beyond the power of recall of most of the employees essential details about the circumstances under which they signed cards. The much shorter delay in *Franks Brothers* v. *NLRB*, 321 U. S. 702 (1944) had no similar prejudicial effect.

It is not necessary that misleading representations be conveyed by word of mouth. Thus it has been held that cards which were distributed to employees along with a covering letter, suggesting that they would be used to petition a Board election, cannot, without more, support a bargaining order under § 8(a)(5). *Bauer Welding & Metal Fabricators, Inc.* v. *N.L.R.B.*, 358 F.2d 766 (8 Cir. 1966). The letter in that case carried a message remarkably similar to that printed in the Union's August 3 handbill, *id.* at 768-769, and the authority is a persuasive one for the respondent.[9] But an additional factor here is the likelihood that the mutlitude of misrepresentations made by specific union solicitors[10] contributed to the more general understanding which existed among the employees that the Union could not win representative status with-

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[9] The record strongly suggests that reliance was in fact placed upon the representation in the August 3 handbill that the cards were "to get an election." Employee Baker testified as follows:

> "Q. (By Mr. Petrie) Mr. Baker, prior to the time that you signed the card in 1962 were you told that the purpose of signing the card was to get an election? A. I wasn't told; that's what I understood by reading the union leaflet."

[10] The inability of most employees specifically to remember who had solicited their signatures, because of the lapse of time, precludes application in this case of the rule, recognized in *NLRB* v. *Golub Corp.*, —— F. 2d ——, —— (2 Cir. 1967), which requires the General Counsel to call as witnesses all the employees whose signatures were sought by those union organizers who generally engaged in misrepresentation concerning the purpose of the cards. Even so, the record discloses that the conduct of at least three solicitors—Hendee, LaFayette and Gavin—was extremely questionable in this regard. This is another area in which the General Counsel derived an unfair advantage from the long, intentional delay.

out an election.[11] It is highly likely that information concerning the cards, like word of employer threats would spread rapidly among the employees, see *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F.2d 176, 179 (2 Cir. 1965), as was no doubt true of the news that signing at that time might mean an eventual saving of $40 to $50.[12]

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[11] Among the cards not specifically considered by the Trial Examiner were those of Wright, Rowe and Dubanevich. Their testimony illustrates that the reliability of their cards is no greater merely because no specific representation was made by an identified Union solicitor. Thus when Wright first came to work at Bryant he was told by ten to fifteen fellow workers that if he didn't sign a card he'd be the only one in the department who hadn't. *Wright:* "Well, I came in there in the middle of July and they told me in our department that everybody signed one so I signed one. . . . Q. Do you remember what was said? A. If they get enough cards they will have an election. . . . Q. And was there talk that by signing Union cards that they could get the Union in? A. No. No, it was for an election, I was told." *Rowe:* "Q. Was there any talk about the purpose of signing the card? A. Well, none other than to get an election, have an election." *Dubanevich:* "Q. Well, what was all this talk about Union that you heard about? A. To have a Union election. . . . I attended to my work and then when I knew I was approached to sign the card to have an election, I signed the card."

[12] One of the Union's tactics was to make it financially attractive to the employees to sign a card. *Perry* testified that he would not have signed his card had he not been told by solicitor Goodell that "if I didn't sign the card and if the Union come in it would cost me $40 to $50 to join." *Godin* testified to having been told at a Union meeting that "if you signed up now, it wouldn't cost so much later on" and *Williams* heard that "there was a smaller fee if you got your card in before the Union got in." There is of course no way of telling how many others signed as a financial hedge, intending to vote against the Union at the election.

Nor can the Board's boilerplate reference to possible lingering effects which respondent's 1962 § 8(a)(1) violations may have on a new election render its bargaining order a satisfactory alternative. Normally the automatic application of the Board's theory in these cases, a theory which has been ably criticized,[13] is supportable as a reasonable exercise of discretion. But certainly that is not the case here, where the Board's own delays have provided more than ample time for whatever prejudice may originally have emanated from the minor § 8(a)(1) violations, which we have sustained, to dissolve and vanish. It defies reason to say that those violations were of such dramatic force and the words used were so imperishable that after five years they still dominate the thinking of the employees, most of whom were not there at the time, so that they are now unable to exercise their power of choice in a fair election. In my view, the Board's remedy, founded on a contrary assumption, was imposed "without regard to circumstances which make its application to a particular situation oppressive," *N.L.R.B.* v. *Seven-Up Bottling Co.*, *supra* at 349, and cannot be sustained. The Board appears to have been so anxious to punish the guilty employer, or to put the union in the saddle regardless of all other considerations, that it has completely ignored the interests of the employees whose rights are of paramount importance but who are represented by no one and who are being deprived of all voice in the matter. To issue a bargaining order and thus compel the employees to accept representation by a union on the basis of cards signed by less than 30% of the current work force is grossly unfair to these employees.

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[13] See Note, 75 Yale L. J., *supra*, at 818-819.

When § 9(c) was rewritten in 1947, Congress indicated that it had come to regard the secret ballot as the best means of effectuating the policies of the Act,[14] which, on occasion, we have found undermined by the requirement of mandatory recognition embodied in a Board bargaining order. *N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2 Cir. 1965). Those policies are clearly undermined here where the validity of a majority of the signed cards was not proven, where the § 8(a)(1) violations took place over five years ago, and where over two-thirds of the present employees have never indicated a desire for representation by this Union by signing a card—let alone by vote in a secret ballot election.

The Board's choice of remedy in this case violates § 10(c) of the Act. Therefore the petition for enforcement of the bargaining order should be denied and an election should be ordered.

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[14] The author of the Yale Note finds in the legislative history of the 1947 revisions a Congressional intention to make the secret ballot the exclusive means of selecting a bargaining representative. 75 Yale L.J. at 820.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 30844

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE

Before: FRIENDLY, HAYS and ANDERSON, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Bryant Chucking Grinder Company to review an Order of the National Labor Relations Board issued against said petitioner on October 4, 1966, and upon the Board's cross-petition for enforcement of its order. The Court heard argument of respective counsel on October 2, 1967, and has considered the briefs and the transcript of record filed in this cause. On December 12, 1967, the Court, being fully advised in the premises handed down its decision denying the petition to review and enforcing the Board's Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Bryant Chucking Grinder Company, its officers, agents,

successors, and assigns abide by and perform the directions of the Board in said Order contained.

HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

FILED: JAN. 3, 1968

A true Copy.

/s/ A. Daniel Fusaro
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

30844

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Intervenor.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
PAUL R. HAYS
ROBERT ANDERSON
Circuit Judges

January 17, 1968

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

30844

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Intervenor.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

January 17, 1968

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * *